

Legacy v Patrick Allen

May 8, 2024
Oral Argument

Transcript Prepared By:



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1 Gillette: May it please the court, my name is Michael Gillette.
2 I am here representing, uh, the hospitals in this
3 case, which involves, uh, the commitment of persons
4 suffering from mental illness to the civil, uh,
5 custody and control of the state. Uh, my clients are
6 responsible in most instances for receiving
7 individuals who are in an acute phase of a mental
8 problem and stabilizing them so that, uh, they can
9 receive further treatment elsewhere. And what we have
10 is a situation in which, although the Oregon Law,
11 which is quoted in our brief, directs that persons,
12 uh, who are to be -- who are stabilized be sent to the
13 Oregon Health Authority and the Oregon Health
14 Authority place them in -- in a facility which is
15 designed to further their rehabilitation and permit
16 them to return to society, the Oregon Health Authority
17 won't do it. Uh, there are -- in- -- instead, what's
18 happened is that the individuals who have been
19 stabilized and then who have received a court hearing
20 -- and by the way, the court hearing is held while
21 they're still in the hospital. It's one of the
22 outcomes of COVID, which you can regard as good or
23 bad, depending on how you feel about that. But, um,
24 the hospital, which finds itself in -- in a position
25 in which someone they have stabilized is ready to be



1 taken in by OHA and placed somewhere where they can
2 receive the kind of long term care that is required in
3 order to really make them safe to return -- safe to
4 themselves, safe to the community, to return to the
5 community --

6 McKeown: May I ask, uh --

7 Gillette: -- won't take them.

8 McKeown: -- a clarifying question because I think the -- the
9 complaint is quite extensive in laying all of this
10 out. Is there a financial dis- -- uh, difference if
11 someone comes in, they're in the acute care, but
12 they're now evaluated, ready for release from acute
13 care, but they can't be released because there's
14 nowhere for them to go. Does the reimbursement to the
15 hospital change, or does it remain an acute care
16 reimbursement? Or how does that work?

17 Gillette: Judge I've -- I've asked that question of my clients
18 and -- and their answers are -- depend on their
19 present experience. But apparently, people who come
20 in needing acute care normally receive whatever
21 coverage for acute care they're entitled to by -- by
22 Medicare or Medicaid or by private insurance or
23 whatever. But, uh, the, uh, recompense for putting
24 them out to another facility is -- depends upon
25 whether that particular kind of insurance also



1 provides that kind of coverage. So, there is no flat
2 answer. Um, the financial consequence to my clients
3 is just that they have someone there that they are not
4 qualified to care for. Let me rephrase that. They're
5 not qualified to provide the kind of care those
6 persons are supposed to be getting. Uh, there's no
7 guarantee that there's going to be, uh, any particular
8 payment to them after the acute phase is finished.

9 Fletcher: Uh, let me elaborate a little bit on Judge McKeown's
10 question. You just said no guarantee they'll be
11 getting any payment.

12 Gillette: My understanding is that for acute care, they get
13 paid. If there's any source of payment, they're going
14 to get paid because they'll --

15 Fletcher: And who are they going to -- who are they being paid
16 by?

17 Gillette: It depends upon whether they have private insurance,
18 or whether they're in a cooperative of some kind, or
19 whether they're subject to Medicare and Medicaid.
20 But, uh, Medicare -- Medicaid, at least, isn't going
21 to pay for long term rehabilitative care.

22 Fletcher: Right.

23 Gillette: And I think that's true of a number of private
24 insurance arrangements as well. So, the answer is
25 there is no answer. It depends on the individual



1 entirely.

2 Fletcher: Thank you.

3 McKeown: And you're asking simply a declaration or injunctive
4 relief. Is that right?

5 Gillette: That's correct. Um, it's a situation in which this
6 problem arose over a long period of time. And in
7 fact, you can trace it all the way back to the '80s
8 when there was a complete shift in national policy
9 concerning persons who were suffering from mental
10 illness. And it can't be cured tomorrow. But it's
11 not going to be cured at all until a state agency,
12 which is responsible for the cure, is told to do your
13 job. Uh, instead, by leaving the patients with us
14 when we're not qualified to provide the kind of care
15 that they need, uh, what's happening is our resources
16 end up being dedicated in part to looking after those
17 people as best we can, and we become just that much
18 less available to those who need our care and for whom
19 we could provide appropriate care. So, that's what
20 the case comes down to. Um, we're harmed because we
21 can't do the work our facilities and our personnel are
22 supposed to be capable of doing, uh, for some people
23 because we've got other people we're required to hold
24 on to and -- and, uh, maintain, which I guess would be
25 the best word for it.



1 McKeown: But you also intimated, or maybe declared more
2 clearly, that there are no facilities -- there are not
3 sufficient facilities for long care -- longer term
4 care patients to go to. Is that right?

5 Gillette: Judge McKeown, I was responding in part to what you --
6 uh, to your own remark. The answer is yes. We've --
7 we've not just intimated that. That's the case. Um,
8 there are -- and I'm going to get the numbers all
9 wrong. But there are 900 or 1,000 available, uh, long
10 term care beds. Uh, and in fact, the need is much
11 greater than that, and it's going to continue to be
12 much greater than that. It is going to require an
13 investment of time and money and thought into creating
14 a system which provides the care that the statute
15 directs these people receive. Um, but in the
16 meantime, as hospitals, we're required to keep these
17 people because, one, they're subject to a judicial
18 order that says they're to be kept -- taken care of.
19 And secondly, because we're a hospital. We're not
20 supposed to turn people who are still ill, whether
21 mentally or physically, back onto the street. And so,
22 we don't do that. Now, there's been an attempt by OHA
23 to suggest that, uh -- and frankly, by the district
24 court judge to say, well, you could just quit. You
25 know, stop providing the care you're providing. That



1 didn't strike me as being a particularly insightful
2 way to approach the problem since hospitals are part
3 of a sort of three-legged stool of -- of security for
4 -- for individuals everywhere in -- in our state and,
5 I dare say, everywhere else. The police, the fire,
6 and the hospitals are the places for emergencies. And
7 we provide emergency care and we're good at it. But
8 we are not -- we are not built for, and we are not
9 staffed for, dealing with people who require the long
10 term care and the -- the special attention,
11 individualized attention that's necessary in order to
12 help these people return to society and be useful.
13 Judge Fletcher, you looked like you were going to --
14 Fletcher: Yeah. Well, uh, I'm -- I'm -- I want to address or
15 have -- have -- have you address the Article III
16 question. Uh, the Article III standing question.
17 This is now hospital standing on its own behalf.
18 Gillette: Yes.
19 Fletcher: Not -- not yet getting to third party standing.
20 Gillette: Understood. Uh, the -- the judge appeared -- appeared
21 to feel that there was no satisfactory traceability
22 between, uh, any harm that the hospital was suffering
23 and anything that OHA had done. I suppose the more
24 accurate way to put it would have been to say what OHA
25 hadn't done.



1 Fletcher: Well, the judge -- the district judge says that you
2 guys are basically volunteers. You signed up for this
3 program, and now you're complaining.

4 Gillette: We didn't sign up for this program. It's -- that's
5 just false.

6 Fletcher: Yeah.

7 Gillette: We did not do that. We signed up --

8 Fletcher: You signed up for a program that turns out not to be
9 the actual reality.

10 Gillette: Yeah. We -- we signed -- we signed a deal to do X,
11 and now we're told, well, surprise. You also are
12 going to have to do Y because we're telling you to.
13 Uh, in the normal administrative law context, the --
14 the OHA doesn't have the authority to delegate to us
15 something that we didn't agree to do for them.

16 Fletcher: It seems to me that you're right with respect to
17 whether or not -- even if you did volunteer, we've got
18 case law out there that says certain volunteers -- and
19 they nonetheless have Article III standing. Uh, the
20 question not really addressed, and maybe not yet teed
21 up, uh, you've got, uh, a takings claim and you've got
22 a due process claim. Uh, and you may or may not
23 succeed, but the court just didn't address that.

24 Gillette: We can't get the door open. We -- we're not being
25 allowed to -- to come forth with our evidence and --



1 and work out a solution for the problem. Yeah. We
2 haven't had that shot yet. This is a 12(b)(6) matter.
3 Uh --

4 McKeown: So, let's assume the hospital -- well, like Judge
5 Fletcher, I'm going to get later to the patients and
6 the third party standing. But let's assume that the
7 district court complied with your request, and that is
8 to issue this, um -- declare that OHA's policy
9 violates various Oregon statutes and possibly various
10 constitutional protections. And -- and then, where
11 would you be? They would say, well, there's no beds.
12 I mean, we can't manufacture a bed out of thin air.
13 So --

14 Gillette: Yeah. The day -- the day --

15 McKeown: -- where would you be? I'm trying to understand the
16 practical implications.

17 Gillette: Sure. The day afterward, we'd be in the same position
18 we're in now. That is to say, we'd have people with
19 us who shouldn't be with us and -- and who needed
20 another kind of care. That can't be fixed in a day.
21 But the judge -- if the judge is willing to enter, uh,
22 an order stating that we're entitled to -- to relief,
23 then we would apply to the court for an order to OHA,
24 uh, at least convening a group. You are -- you are
25 going to hear another case today that involved that



1 same process being used in Oregon with respect to
2 those who had been committed in the criminally, uh,
3 uh, convicted or accused side of things. Uh, it would
4 be necessary for people to get together and propose a
5 solution. There is, in fact, a movement underway, uh,
6 in -- in the Oregon, uh, Legislature to take another
7 look at this problem. But the -- the other look is
8 going to then require weeks and months and years of --
9 of well-intended effort in order to permanently solve
10 the problem. In the interim, we will continue to care
11 for these people because we're a hospital and because
12 that's what we're supposed to do. It's not a
13 satisfactory arrangement from our point of view, and
14 it -- it misapplies, uh, our re- -- our assets to a
15 degree. But to turn them out or to say, alright, you
16 -- you folks -- uh, we've stabilized you now. Now, go
17 out on the street again. That's not -- that's not
18 medicine. That's not --

19 Fletcher: You know, this --

20 Gillette: That's not performing that service.

21 Fletcher: This is a kind of a follow-on. Uh, assume for a
22 moment that you were to -- we were to find standing,
23 and we were to say that, uh, this can go forward.
24 This is a version or a carry-on of Judge McKeown's
25 question. What then? Would one of the possible



1 remedies be, uh, that the state has to compensate you
2 for keeping them in this long term way? The
3 compensation that you apparently, in some cases, are
4 not receiving.

5 Gillette: Your Honor, I don't think that would work for -- for --
6 -- at least, I can't imagine it working the way things
7 stand now because we can't do this work. The -- this
8 is not -- if they compensate us for something --

9 Fletcher: No. No, no. I -- no. No. I -- well, I understand
10 you can't do this work.

11 Gillette: Yeah.

12 Fletcher: But nonetheless, you are keeping them, uh, uh, in a
13 way that you say really is not appropriate. But
14 you're nonetheless keeping them. And it's at
15 considerable expense to you, apparently, in some of
16 these cases, where you're not getting reimbursement.

17 Gillette: Yes.

18 Fletcher: Well, if your takings claim succeeds -- well, what
19 takings is the government imposed an obligation upon
20 you for which it owes money but is not paying.

21 Gillette: This -- this begins to slide over toward the reason we
22 also wish to appear in a representative capacity. We
23 don't want money. We want to help these people.

24 Fletcher: Mm-hmm. Yeah.

25 Gillette: And -- and the money ain't the answer.



1 Fletcher: Okay.

2 Gillette: And -- and if that seems a casual answer, I -- I
3 apologize. But that's -- that's literally --

4 Fletcher: No. It doesn't seem casual. No. I -- no. I
5 appreciate the answer. It does not appear to be a
6 casual answer at all.

7 Gillette: Yeah. We're -- we're not in that line of work. We're
8 not for profit. We'd prefer to be not for profit for
9 the right people. Unless the court has other
10 questions, uh, and -- and paying attention to the
11 judge's reminder with respect --

12 Fletcher: Oh, well, no. I'd like you -- I'd like --

13 Gillette: -- to no penalty would be imposed.

14 Owens: Third party standing.

15 Fletcher: I'd -- no, no. I'd like you to address the third
16 party standing --

17 Owens: Yeah.

18 Fletcher: -- because --

19 Gillette: Okay. Great.

20 Fletcher: -- we're accustomed to third party standing where the
21 doctor, uh, is advocating for his or her patients, uh,
22 and the doctor wants to provide care for the patients.
23 This is an odd one. You're advocating for the
24 patients because you don't want to provide care for
25 them, uh, which gives me pause.



1 Gillette: Well, I guess I -- I want to phrase it differently
2 because it works out better for me. I want to say
3 we're advocating for our patients getting the
4 appropriate level of care, which as it happens at the
5 moment, we cannot provide.

6 Fletcher: No, no. That -- that's -- that's another way and --
7 and an accurate way of saying it.

8 Gillette: Yeah.

9 Fletcher: I know. I -- I get that.

10 Gillette: Okay. And -- and -- and that's the way I would want
11 to go at it. Uh, let me suggest -- and we've -- we've
12 cited cases to you, and you will find them useful or
13 not as -- as appears appropriate. But there's a case
14 from Pennsylvania, uh, involving a, uh -- a group of
15 psychiatrists who brought what amounted to a claim
16 that's reasonably similar to the one we're bringing,
17 trying to influence the care that's being given to
18 psychiatric patients. Uh, the idea here is that if
19 the only care we can provide is to advocate for them
20 getting care somewhere else, then that's the care
21 we're going to advocate for. This is still part of
22 our mission.

23 Owens: Let me ask you this. Why couldn't someone else other
24 than the hospital represent these people? I
25 understand these people are going to need extra help



1 in terms of finding lawyers and -- and representation.
2 But there are many other groups who would -- who can
3 step up and represent them. Why is it the hospital,
4 which -- and I -- I appreciate you've done a very good
5 job of articulating why there isn't a conflict. But I
6 could see other groups that would have an even easier
7 time, uh, stating why there isn't a conflict. So, why
8 -- why can't one of those groups represent in these
9 third party claims?

10 Gillette: To the extent other groups exist, they haven't stepped
11 up. They just haven't done it. Uh, there is a group
12 that is representing, uh, again, the criminally
13 accused in Oregon, Disability Rights Oregon, which has
14 done, uh, a splendid job of representing that group.
15 Um, but it has not seriously dipped its toe in this
16 water. It's left this to other people. There's also
17 an organization called -- I think it's NAMI, which is
18 an organization that's made up in part of people who
19 actually have been, um, patients in this kind of
20 system and who are advocating for others who are
21 suffering from mental illness. And they -- they are
22 an advocacy group. They're not put together to
23 provide the service, uh, uh, and the advocacy that
24 we're providing. They would prefer to support rather
25 than sponsor. So, you have an amicus brief from them



1 that says what -- what they said. We agree with that.
2 So, the answer, Your Honor, is that there ain't many
3 folks, and none of them have stepped up. And this has
4 been going on a long time. This -- we didn't just
5 discover this last Tuesday. And so we've been driven
6 to it.

7 McKeown: So, the -- the -- you have two groups of people here.
8 You have the criminally committed that you say
9 potentially the Disability Rights Organization could
10 represent. But then you have those who come in on
11 just a regular civil commitment, right? Um, and had -
12 - has anyone ever represented them as a group?

13 Gillette: As a group? No.

14 McKeown: Are you aware of any individual suits? Um --

15 Gillette: Yes.

16 McKeown: Okay.

17 Gillette: Yes. There was one that was prosecuted by one of the
18 hospitals that's one of my clients. Uh, and I'm
19 trying to remember when. But it wasn't too awful long
20 ago. Two or three years ago. And they pushed the
21 lack of -- of facility and so on against OHA and won.
22 Uh, but the difficulty was that was one person, and
23 we're talking --

24 McKeown: Oh, it was on behalf of one patient?

25 Gillette: That was on behalf of one patient only. Yeah. Um,



1 but again, that was a hospital pushing it. Um, just -
2 - this isn't sexy with respect. It -- it just is
3 simply something that folks are not inclined to dive
4 in on. And when you look at the provisions of Oregon
5 Law, and I think this is true most places with respect
6 to representation, a person who is faced with civil
7 commitment is entitled to counsel. Uh, and there is a
8 very carefully set up process by which, uh, the
9 person's mental state is judged by an appropriate
10 judicial officer. But the minute they are committed
11 to the care and custody of -- of the hospital, uh,
12 Oregon Hospital, there is no further legal help for
13 them at all. No -- no provision in -- in Oregon Law
14 whatsoever. It's either OHA does its job, or they are
15 lost. And so -- and I guess this is addressing your
16 question, Judge Fletcher. Um, this is an honor we'd
17 just as soon have skipped. But somebody with a
18 conscience needs to do this. And -- and we are in --
19 we are in the business of trying to help those who
20 can't help themselves. So, it's -- it's our job. Um,
21 and you can imagine the time it might take for
22 somebody else to tool up, even if we could point to
23 somebody else, which would include Disability Rights
24 Oregon. They have, uh -- they have a long standing
25 process they've gone through before this same judge,



1 with respect to the care that's being given to persons
2 who are committed in the -- in the criminal justice
3 system. And it's not the same kind of problem. So
4 then, I'm not sure that they could tool up with --
5 with it for some period of time. And they'd have to
6 expand what they're doing because that's -- right now,
7 that's all they're doing, and they're using their
8 resources to do that. There just isn't anybody.

9 Fletcher: And there might even be some conflict between your
10 client -- or rather, the -- the patients that you have
11 at issue and the criminal because, as I gather, what's
12 happening is that the Oregon Hospital is giving
13 priority to the other two groups, and your -- your
14 people are at the bottom.

15 Gillette: I didn't want to say it that way because I admire what
16 DRO does. But the truth is that whatever pot of cash
17 eventually will be used here, there is one group that
18 already is seriously invested in getting that pot of
19 cash for their particular set of clients, and they are
20 not ours.

21 Fletcher: Yeah.

22 Gillette: If the court would allow me, I would like to reserve
23 five minutes for rebuttal if I've still got it. But
24 I, uh --

25 Owens: Well -- well -- well, I'll -- I'll compromise. We'll



1 give you four.

2 Gillette: That's -- that's more than -- more than fair. And

3 I'll get out of your way.

4 Owens: Alright.

5 Gillette: Thanks very much.

6 Buehler: Good morning, and may it please the court, Dustin
7 Buehler, appearing on behalf of defendants appellees
8 in this matter. Um, I think the key thing that
9 opposing counsel just said, which really is essential
10 to the three issues before this court, is that this is
11 a long standing, challenging problem that Oregon
12 faces, and it doesn't face it alone. Many other
13 states are, uh, facing similar challenges when it
14 comes to providing adequate care for civil commit- --
15 committed individuals.

16 Fletcher: You say a challenge that Oregon is facing. It's a
17 challenge because Oregon is not stepping up to the
18 plate. It's a challenge because Oregon is -- is -- is
19 not fulfilling its responsibility and then we're
20 trying to do -- figure out how do we deal with that.

21 Buehler: So, they -- the -- that is what the complaint alleges.
22 Certainly, Judge. Um, and, you know, what is key,
23 though, about that is that when you look at the
24 Article III standing question -- and I'm happy to take
25 each of the three issues before the court in order



1 unless you want to steer me in a different direction.
2 Um, but if you look at Article III standing, as you've
3 alluded to, Your Honor, uh, the question really here
4 is, well, was this voluntary, right? And -- and that
5 is -- I mean, this court will ultimately determine
6 whether there's jurisdiction or not. But the district
7 court concluded that notwithstanding those real
8 problems alleged in the complaint here, uh, the
9 hospital plaintiffs have known about those challenges
10 for decades, as opposing counsel just, uh, told you,
11 and they have not only, uh, sought certification to
12 provide acute care services, but they have, every two
13 years, re-upped that certification. And at some
14 level, that is going to break the chain of causation,
15 as the case law describes, such that you don't have
16 Article III standing to seek an injury that is not
17 surprising and that you have known has existed for, um
18 -- as -- as plaintiffs say, for decades.

19 McKeown: It seems like, uh, kind of a nugatory argument in the
20 sense that, let's say, they don't seek certification.
21 Who is going to care for the acute care people? If
22 they get dropped into their hospital, they have to,
23 right? So, it -- it -- that is an argument that maybe
24 has some legal legs way back, but I just -- I'm having
25 trouble getting a practical head around it. So, maybe



1 you can help me.

2 Buehler: Certainly, Judge. So, um, as described, uh, in the

3 briefing, there is this, uh, uh -- let's call it the

4 ERs door, right? The emergency room care. And some

5 of these, um, patients that the hospitals seek to

6 represent in a third party capacity here do come in

7 through those doors. Um, and there are federal laws,

8 state laws that require the provision of emer- --

9 emergency care. And although there was confusion, um,

10 I -- I think, frankly, the lawyers for both parties at

11 the district court hearing were not consistent in

12 their statements at times. Um, I think when you're

13 civilly committed, you don't just get let loose. That

14 -- that is not a choice, right? So, just -- let --

15 let's just make that clear here. Um, but I -- I still

16 think if you look at the moment at which they have a

17 claim that they're seeking relief for -- and that

18 moment, to be clear, is, uh, somebody has been civilly

19 committed and placed in their hospitals, and there's a

20 moment sometime after that where they then need, uh,

21 care that plaintiffs would not describe as acute care,

22 right? So, that is the moment at which they have a --

23 uh, that they're -- that they're asserting claims.

24 And if you look at that moment, for years, they have

25 sought to provide acute care services because there is



1 an advantage to the hospitals in doing so, a business
2 advantage in doing so. The record shows that. The
3 complaint shows that, too. And they've done that with
4 full knowledge that the bitter comes with the sweet,
5 so to speak.

6 McKeown: No. But under the law, you can sign up for acute
7 care, but you didn't sign up for long term care. So,
8 it would seem to me, at that point, they have not
9 taken advantage of the system because even if they
10 signed up for acute care, it should have ended.
11 That's what they signed up for was a fixed term. But
12 now, they're com- -- they, like some of these
13 individuals, are, like, committed for a long time.
14 So, it seems to me that, at that point, that they
15 haven't advantaged the system in some way, or they
16 haven't affirmatively invoked the system. They'd like
17 to uninvoke the system because their argument is that
18 your client is violating the Oregon statute. So, it
19 seems to me that -- that they would have standing.
20 And I -- I just -- I'm having trouble buying the idea,
21 well, you signed up for acute care, so in for a dime,
22 in for a dollar, in for a 100,000 dollars, or whatever
23 the case may be.

24 Buehler: Yeah. So, um, it is clear. And -- and these are in
25 the documents, um, that the district court took



1 judicial notice of showing what -- what boxes they
2 checked, right, in the excerpts of record. And -- and
3 it's clear that they sought to provide acute care.
4 And I would even add, uh --

5 McKeown: Sure. And I -- and I just said that. That's
6 absolutely true.

7 Buehler: Right. And -- and -- but the --

8 McKeown: But did they -- did they sign up to provide long term
9 care?

10 Buehler: So, you -- uh, so, if -- if what we're referring to
11 are the boxes for secure residential treatment
12 facilities, under Oregon regulations, hospitals --
13 they -- they can't check those boxes. Those are
14 limited to six to, um, uh -- to -- uh, six to 16
15 patients. So, they -- they -- they applied for the
16 care that they could, right? And then, I -- I think
17 the key thing for Article III -- and look, it's either
18 good enough or it's not. It's -- it's what the
19 district court thought. Um, is that they signed up
20 for that acute care service level knowing full well
21 that the door out was not a meaningful door out given
22 the strain on the system. And so, the question really
23 is, for Article III, is that knowledge when you re-up
24 enough? Uh --

25 Fletcher: So, how -- I -- I -- I understand your argument. But



1 how do you deal with -- and there are several Supreme
2 Court cases along this line. There's the Medgar Evers
3 case, there's the Havens -- Havens Realty case.
4 There's the more recent cruise case. In all of those
5 circumstances, the plaintiff is coming into something
6 that he knows is going to be a problem. He does so
7 voluntarily, and then he objects to it. How -- how do
8 you distinguish those cases?

9 Buehler: Right. And -- and I will acknowledge the tension in
10 the case law, right?

11 Fletcher: Mm-hmm.

12 Buehler: Um, certainly, I'm not going to hide from that.

13 Fletcher: Yeah. Yeah. Sure.

14 Buehler: Um, I think the way I would distinguish it was
15 articulated by the 10th Circuit, um, in Fish v. Schwab
16 and Fish v. Kobach, where the court said, look,
17 there's a difference. There's a meaningful difference
18 between cases in which you're challenging an un- --
19 unlawful regime by statute and regulation, right? So,
20 there's, um -- let -- let's say, like the cruise case.
21 There is an allegedly unlawful federal enactment. And
22 really, the only way you can challenge that is to
23 disobey it, right? So, that's one category of cases.
24 What the 10th Circuit said, um, is that that's
25 different from something that is more akin to a freely



1 negotiated contractual -- con- -- con- -- contractual
2 arrangement. Now, I will admit this is not purely a
3 contractual arrangement. But the argument that the
4 district court seemed to find allur- -- uh, uh, uh,
5 convincing is that, uh, when you, years ago, apply for
6 certification to provide care, and for years and years
7 and years, as alleged in the complaint, you are -- are
8 not just providing that care, you're providing more
9 than that, uh, and you keep re-upping every two years,
10 that starts to look like a voluntary business
11 arrangement that, um -- that -- that in the hearing --
12 and I would direct you to pages, um, uh -- really, the
13 key pages or pages 98 to 101 of the excerpts. This is
14 in the second volume. Uh, it's the portion of the
15 hearing that the district court relied on, for better
16 or worse, for its Article III conclusion on standing
17 where counsel, um, said, uh, that currently, the way
18 it generally works is if you're not a certified
19 hospital, you can transfer outpatients to a certified
20 hospital. That is -- that is how it works. And that
21 they are choosing to certify and to take on the bitter
22 with the sweet because there is an advantage to
23 providing acute care. And so, um --

24 Fletcher: And in the contract that they enter into with the
25 state, they agree to take for acute care, and then



1 they're stuck with obligations because of their status
2 as a hospital, but not because of the contract. Is
3 that -- am I understanding that correctly?

4 Buehler: It -- I -- I would -- I would say it's reality, right?
5 Yeah. That -- that is how the system is working. And
6 they -- they -- they know that there are certain
7 federal laws, as you're referencing, uh, Your Honor,
8 state laws that obligate them to continuing care for
9 emergency room care, for example. Um, but I think the
10 broader argument is that they -- I heard opposing
11 counsel say that this was surprising. If -- if you
12 look at the complaint and you look at the documents
13 that are judicially noticed and you read the
14 transcript of the hearing below, this was not a
15 surprise. And that's either good enough or not good
16 enough for Article III standing. We would say it's,
17 uh -- it's -- it -- you know, they don't have Article
18 III standing for that. Um --

19 Fletcher: And you've not yet re- -- addressed in this lawsuit
20 the underlying cause of action under the antitrust --
21 uh, excuse me, under takings or under due process.
22 That -- that -- we just not -- are not -- not at that
23 stage. Correct?

24 Buehler: Well, so, below, um, there was a 12(b)(1) and 12(b)(6)
25 motion together. Uh, the parties briefed both the



1 jurisdictional issue but also the --

2 Fletcher: Takings and the due process.

3 Buehler: Correct.

4 McKeown: Mm-hmm.

5 Buehler: And -- and -- and there is even -- you can see in the
6 transcript the district court asked some questions
7 about the merits, or at least on a 12(b)(6) posture.
8 The district court did not get to that.

9 Fletcher: Yeah. Okay.

10 Buehler: It -- it just concluded it didn't have standing. And
11 -- and all -- you know, in fairness, if you read the
12 transcript, the way it reads to me is that, um -- part
13 of what was unsettling about that discussion is I
14 don't know going into that hearing if the parties
15 were, uh, aware that -- that -- that the judge -- the
16 district court judge really was interested in
17 standing. And so, that's where you get some of the
18 inconsistencies as to who can quit or not at various
19 stages of offering care. And I just want to be clear
20 to the court. I think the key thing to think about
21 here is not whether you can release somebody who is
22 civilly committed because I don't think you can. I
23 think the question is when a hospital goes into an
24 arrangement and re-ups time and time again with full
25 knowledge of what that arrangement is, uh, is that



1 voluntary? That's the question. And -- and -- and to
2 be clear, look, we're glad that they care for these
3 patients. Uh, we pay them. We would pay them more.
4 But for Article III, I think the question really is,
5 is it voluntary?

6 Fletcher: Well, let me pause. You would pay them more under
7 what circumstances? You would pay them more. Tell me
8 more.

9 Buehler: Uh, yeah. And I don't know the details of this. I
10 just know that the attitude -- I mean, you can see it.
11 It's said in the hearing below. I mean, that's what
12 counsel for OHA said below is that it's not -- it's
13 not like we have animus to these hospitals. We
14 understand the strain that this puts them under. But
15 at some point, you know, it's kind of the Casablanca
16 shocked to find gambling, uh, scenario where they --
17 they knew about this for years. And so, to seek
18 redress for it seems a little disingenuous.

19 McKeown: Can -- I want to have, uh, you explain a sentence in
20 the judge's order. It says counsel for health systems
21 confirmed that were health systems to decide not to
22 seek certification, they would no longer be required
23 to keep civilly committed patients for long term
24 stays.

25 Buehler: Yeah. So, um, uh, here is how I would explain that.



1 McKeown: Okay.

2 Buehler: Um, and I -- I'm not sure -- I can't put myself in the
3 district court's mind.

4 McKeown: No, no. I'm just trying to understand the fact.

5 Buehler: Right. Uh, here -- here is my understanding of the
6 facts is there was that moment during the hearing, um,
7 where counsel for the hospital said -- and this is in
8 the middle of page 98 of the excerpts.

9 McKeown: Mm-hmm.

10 Buehler: Said, look, the way this generally works is if you're
11 not certified, uh, you transfer out the patient. Uh,
12 you know, uh, the patient is transferred to a
13 certified hospital, right, when they come into the ER
14 or, uh, when -- when they come in the door. And then,
15 you know, on the next page or two, counsel says, look,
16 we choose to be certified because, um, there are
17 advantages, business advantages, of providing acute
18 care. Um, as -- as to what that --

19 McKeown: Okay.

20 Buehler: -- sentence means in the district court's opinion --

21 McKeown: Well, let's say somebody comes in, like, for a 72-hour
22 hold. We're going to have a hearing.

23 Buehler: Right.

24 McKeown: They don't seem to be mentally capable of being
25 released. But they're in this -- they come in,



1 usually, through the emergency room in those
2 situations. So, they're in the emergency room. They
3 got to put them in a bed. They aren't going to be
4 released, but they're in a place where there's no
5 certification. Where do they go? Do they just stay
6 at that facility because there's no long term care?

7 Buehler: So, uh, at the initial phases -- you're talking about,
8 Judge, when they arrive at an uncertified hospital.
9 My understanding is that when that is -- like,
10 currently, the way that is handled is they are
11 transferred out. Like, they're, uh, uh -- they're --
12 you know, that -- Oregon Law is clear that you require
13 certification to treat civilly committed patients.
14 And so, um -- so, they are transferred to a facility
15 currently that can provide that service. Um, and --
16 and that's my understanding is that --

17 McKeown: And -- and how many facilities beyond the facilities
18 operated by this organization are certified to provide
19 that care?

20 Buehler: So, I don't know offhand. I -- I -- I -- I know what
21 they allege in the, um --

22 McKeown: The complaint.

23 Buehler: -- the proposed second amended complaint that they
24 have 57 percent of the, uh, acute psych- --
25 psychiatric beds statewide. That -- that's the only



1 fact that, I think, we have in the record. Um, but I
2 don't know the answer to --

3 McKeown: Thank you.

4 Buehler: -- your specific question. I -- I do want to just --
5 um, I don't want to steer the court away from this if
6 we want to talk more about it. But I do want to
7 address third party standing, too.

8 McKeown: Well, we do, too. So, let's --

9 Buehler: Oh, great. Let's do that.

10 McKeown: But we're not going to there if we don't get --

11 Buehler: Yeah. Let's do that. And -- and --

12 McKeown: -- but -- if we don't get here.

13 Buehler: And like all the counsel --

14 McKeown: But we want to hear from you.

15 Buehler: -- before me, I'm trying to, Judge Owens, take you up
16 on your challenge to leave time on the clock, and I am
17 failing. And so, I -- I will continue to try to do
18 that. But, um, just briefly addressing the third
19 party standing issue. I think what is probably the
20 best place for this court to look in the record is in
21 the supplemental excerpts of record. There is an
22 amicus brief that was filed below that the district
23 court found quite persuasive from Disability Rights
24 Oregon. Now, this is the organization that is
25 federally designated as the protection and advocacy



1 system for those with dis- -- disability in Oregon,
2 including, uh, those with mental illness. And you can
3 just -- uh, I'm not going to repeat them ad nauseam
4 here. But I mean, you can see the reasons given by
5 Disability Rights -- Rights Oregon, why it's
6 concerned, um, about the potential for a divergence in
7 incentives here. And -- and while I greatly
8 appreciate, um, the spirit of opposing counsel's
9 comments today about their mission, the hospital's
10 mission, and while we -- we -- we are grateful for the
11 provision of service by hospitals, uh, if you look at
12 the complaint, you can see that tension. So, um,
13 looking at the relief, uh, in the complaint that's
14 pled in the complaint -- this is on pages 254, 255 of
15 the excerpts of record. There is both, um, a request
16 for declaratory injunctive relief to -- to have OHA
17 discontinue forcing them to provide indefinite care.
18 But then there's also, um, uh, a request for relief on
19 behalf of these patients for them to receive the best
20 available treatment in a suitable facility. When you
21 overlay -- and -- and -- and I would cite this as
22 passim in the complaint, the number of times where
23 they point out, as they did today, that there just are
24 not enough beds. You're left with a divergence and
25 that, either a result here or maybe even a negotiated



1 settlement, um, by prioritizing the let's get them out
2 the door, you could lead to suboptimal placements.
3 And that is just a fundamental tension here in these
4 claims. The case law is quite clear that third party
5 standing is not the norm. And here, um, uh, hospitals
6 that have a financial incentive to transition patients
7 out are not going to be, as DRO noted below, the best
8 advocates for the patient's interests. And there is
9 that inherent tension here that the district court,
10 uh, based its third party standing ruling on. The
11 other thing I'll just point out briefly is pa- -- uh,
12 paragraph 43 of the complaint. This is on page 239 of
13 the excerpts. Uh, notes that these hospitals are
14 losing -- ass- -- asserts that these hospitals are
15 losing tens of millions of dollars each year because
16 of this arrangement. Uh, they are asking for just
17 compensation. And that is a not insignificant amount
18 of, uh, funds that, if reallocated through just
19 compensation, could lead -- uh, cause suboptimal
20 placements because of the systemic effect that that
21 would have. Um, and -- and look. I'm not pointing
22 out anything that isn't noted in the, um, DRO briefing
23 below. But I -- I just would urge this court to think
24 carefully about that, given that the interests of
25 patients are important here.



1 McKeown: So -- so, the upshot with no standing is that
2 inadequate care continues apace, right?

3 Buehler: No. That's -- that's not true. Um, you know, both in
4 the Mink case -- there are discussions in the Mink
5 case, um, and more generally, to try to improve this
6 care. Um, there is -- um, and look, this is not in
7 the record, which is why, uh, I'm not going there,
8 except to answer your question. Uh, you know, uh, OHA
9 now has coordinators that meet regularly with the
10 hospitals to try to improve transfers --

11 McKeown: Mm-hmm.

12 Buehler: -- um, to listen to concerns around specific patients.
13 So, it -- it's not -- I just want to disabuse the
14 notion that it's lawsuit or bust. That is not true.
15 I understand I can't point to places in the record
16 that show that because we're on a 12(b) motion. But,
17 um, I just don't want this court to be left with the
18 impression that this lawsuit is the only way.

19 Fletcher: Well, let me understand, again, the practicalities.
20 It appears that the hospital capacity or the treatment
21 capacity for long term just doesn't exist. Is that
22 right? I mean, that's the basic problem.

23 Buehler: So, uh, yeah. I mean, I -- I think that that is --
24 uh, it -- it's alleged in the complaint. And while,
25 you know, we could quibble with the allegations, I



1 think it -- it is no secret that there is inadequate
2 beds in the state of Oregon, um, generally, including
3 long -- long term care.

4 Fletcher: Uh, and is Oregon required by Oregon statute to
5 provide such beds, and Oregon just isn't doing it?

6 Buehler: So, I -- I -- I will admit, Judge, I don't offhand
7 know. I -- I just don't know enough about -- uh, it's
8 a very elaborate legal, you know, statutory regime. I
9 just don't know offhand here today.

10 Fletcher: That -- that puzzles me that you -- that you're --
11 you're -- so -- so, maybe Oregon is required to
12 provide the beds and maybe not. That's your answer?

13 Buehler: No, no, no. I -- and I'm sorry about that. So, what
14 I'm saying by that is, certainly -- so, here's where I
15 would point for that if I were, given the record and
16 the law, as I understand it. I mean, Oregon has an
17 obligation when OHA takes civilly committed persons
18 into custody upon their commitment, um, to make an
19 appropriate placement and to, um -- you know, in
20 Chapter 426 of the Oregon Revised Statutes, there are,
21 uh, obligations on the Oregon Health Authority to --
22 to make adequate placements, uh, uh, to, uh, calibrate
23 those placements with the level of care that's
24 appropriate. It also says that the placement decision
25 is a final decision. Um, there is -- going back to



1 the third party issue. There is an ability by civilly
2 committed persons to challenge those placements. That
3 is a procedural safeguard in the statutes. But, um, I
4 -- I don't want to leave you with an unsatisfactory
5 answer. Uh, the -- the -- that's what's coming to
6 mind in terms of how that works and the obligation of
7 OHA to place people appropriately, um, in facilities
8 that are calibrated with the appropriate level of
9 care.

10 Fletcher: Well, and the obligation to place. Does that include
11 the obligation to provide? Meaning does Oregon have
12 an obligation to provide suit- -- suitable facilities?

13 Buehler: Yes. So --

14 Fletcher: As I understand Oregon law, it does have that
15 obligation. But you can tell me I'm wrong.

16 Buehler: So, I -- yeah. I -- and I just don't have that before
17 me. So, I -- I don't -- I don't want to get that
18 wrong.

19 Fletcher: Okay. Help me more -- some more with the third party
20 standing in terms of -- you -- you predict that if we
21 were to allow a third party standing here, some --
22 some optimal -- some suboptimal thing is going to
23 happen. What is that suboptimal thing, and why is it
24 going to happen, in your view?

25 Buehler: Yes. So, I think the hospitals -- um, their complaint



1 is replete with allegations showing that, um, you
2 know, this is a -- it's -- it's a financial
3 disincentive for them to keep, uh, patients into long
4 term care or beyond what they would say the period of
5 acute care is.

6 Fletcher: Right.

7 Buehler: Also, they say repeatedly that, um, there are other
8 patients they have, non-civilly committed patients,
9 that need the beds. And so, there's a tension there
10 among their -- sorry, among their, um, categories of
11 patients where they might not have the undivided
12 loyalties to these patients. And if the goal is to
13 transfer them out, we are in a system where, you know,
14 there just are not adequate beds, meaning where -- and
15 -- and DRO notes this in its briefing. Uh, there's no
16 guarantee that they'll go to a place that is as good
17 as their current placement, is what I'm trying to say.
18 And DRO made that argument in its amicus brief below.

19 Fletcher: And is the hospital seeking permission to send them to
20 some sub- -- suboptimal place? I mean, is that what
21 they're requesting in the lawsuit?

22 Buehler: No. That's not what their relief is in the lawsuit.
23 No. But I -- I'm just saying --

24 Fletcher: So -- so, what makes you think that's going to be the
25 result of the lawsuit?



1 Buehler: Because I think the practical reality is, as DRO noted
2 in its briefing below, that there is just a tension
3 between trying to get them out as soon as you can so
4 the beds are --

5 Fletcher: No. I under- -- no. I under- -- no. I understand
6 that. But -- and that -- that exists no matter how we
7 rule. I mean, that -- that's -- that's been in
8 existence for a very long time. And they apparently --
9 -- they're keeping them. So, how would an order from
10 our court that says, uh, Oregon has an obligation to
11 provide suitable placement for these people -- how
12 would that change the reality? How would that then
13 allow them to send them to some suboptimal place where
14 they're not now sending them?

15 Buehler: Yeah.

16 Fletcher: How -- how would that change?

17 Buehler: So, I -- I -- I mean, I -- I think -- I think the
18 point is -- and you're right. There's an obligation
19 to place them suitably. And thank you. Because that
20 -- that really, I think, addresses your earlier
21 question. That is in the statutes. Uh, I just think
22 if you have a situation where these hospitals are
23 rendering care because they need to, um, and because
24 of the strain on the system -- you know, as they say
25 in their complaint, there just are not beds elsewhere



1 to send them to. And I think that that means if
2 you're trying to transition them out, you know,
3 there's an assumption that there are other beds, and
4 that's just not the case as alleged.

5 Fletcher: But as I unders- -- but I understand that -- what --
6 what I understand, the purpose of the underlying
7 lawsuit is somehow to force Oregon to start spending
8 money to provide appropriate placement that Oregon has
9 so far been unwilling to spend. I mean, uh, uh, that
10 -- that seems to me the thrust of the lawsuit.

11 Buehler: So, I mean, and they could speak to that. But my
12 understanding is that -- although, if you look at the
13 relief, I just want to note, it's not just that,
14 right? Like, there is a financial aspect of this for
15 the hospitals that may converge but may diverge. So,
16 I just want to acknowledge that. But yes. I think
17 that that is --

18 Fletcher: Well, then, I'm trying to understand the may converge
19 because the may converge depending on how likely there
20 is a divergence -- I mean, that's -- that's the key to
21 the third party standing analysis.

22 Buehler: Right. Yeah.

23 Fletcher: And I'm -- and I'm having trouble still understanding
24 the nature of the divergence because I think I just
25 heard you say that if we allow them to go forward as



1 third party representatives, uh, they're nonetheless
2 going to be subject to the same obligations they have
3 now in terms of not placing them to some suboptimal
4 place. But you told me they're going to do that. And
5 I don't get -- I -- I don't quite understand yet.

6 Buehler: Well, so, and this is -- Your Honor, this is where
7 maybe the, um -- the transcript below is informative
8 because there was a -- there was a colloquy below
9 where, for example, the district court judge said,
10 well, what if this -- you know, what if this case went
11 into settlement, um, discussions at some point? Like,
12 isn't there a tension between the hospitals and their
13 interests, financial or otherwise, and -- and the
14 interests of these patients in, uh, receiving a
15 placement that is suitable regardless of the financial
16 cost, right? And so, uh, I mean -- and I understand.
17 Look, part of the challenge here is we're trying to
18 think ahead hypothetically to what could happen. But
19 I still think, like, that exchange below is very
20 informative because the path of litigation could lead
21 to a moment, and frankly, likely would lead to a
22 moment where the hospital's, um, interests would
23 diverge from patients that -- that need the best care
24 available, regardless of cost or other considerations,
25 regardless of whether pa- -- whether patients may need



1 that bed in the hospital. At some point -- and this
2 is really the point that DRO was making below. Um,
3 they're just different interests. Um, I see I'm way
4 over my time, and I apologize for that.

5 Owens: No, no, no. What --

6 Fletcher: No, no. (Inaudible - 00:43:39) --

7 McKeown: We put you there.

8 Buehler: Yeah. Thank -- and thank you. You've -- you've given
9 me my workout. And -- and unless there's any other
10 questions, we would urge you to affirm.

11 Owens: Thank you, Counsel.

12 McKeown: Counsel, I have a question. If the court were to
13 determine that the hospital has standing but that
14 there's no third party standing, what would be the
15 difference in the outcome of the relief?

16 Gillette: I -- that's funny. I never thought about it quite
17 that way because, um, I've assumed that there was
18 standing both ways. Um, it seemed pretty obvious to
19 me that there was. But that -- that's just the way I
20 was thinking about it. I don't know there would be
21 any difference in the outcome to -- to tell you the
22 truth, Judge McKeown. We're -- we're advocating for a
23 single thing. We're advocating for OHA to get on the
24 -- its horse and do something. And if it does, the
25 people that we're caring for in the interim will



1 finally -- or their successors will finally have some
2 place that they can be placed where they have a chance
3 at rehabilitation and the ability to return to civil
4 society.

5 Owens: So, let me jump in there because the complaint has
6 certain counts as to the hospital and certain
7 complaints as to the patients. I take it that from a
8 pract- -- you're saying from a practical perspective,
9 there would be no difference. I take it that, in the
10 complaint, there would be certain counts --

11 Gillette: Yeah.

12 Owens: -- that would be dropped.

13 Gillette: Yes, sir. I -- I beg your pardon. Uh, uh, that's --
14 that's precisely what I'm saying because I've -- I've
15 looked at the two sides of it, and I've thought this --
16 - these guys aren't just twins. They're the same
17 thing. Uh --

18 Fletcher: No. That doesn't make any sense to me because the
19 first party claims the hospital is making, uh, one of
20 them is a due process claim.

21 Gillette: Right.

22 Fletcher: One of them is a federal takings claim.

23 Gillette: Yes.

24 Fletcher: And the other one is a state takings claim.

25 Gillette: Yes.



1 Fletcher: The remedy for a takings claim is pay me money.

2 Gillette: We have --

3 Fletcher: Pay me money.

4 Gillette: We have --

5 Fletcher: The -- the remedy for a takings claim is not provide
6 suitable placement for those pa- -- patients.

7 Gillette: Judge -- Judge Fletcher, pardon me. I didn't mean to
8 interrupt, sir.

9 Fletcher: Yeah.

10 Gillette: Uh, we have filed an amended complaint, and the judge
11 has never really indicated what he was going to do
12 with it one way or the other. But since his basis for
13 dismissing the case and not allowing another complaint
14 was he was saying that, uh, we had volunteered for
15 this problem, I assume that I'm entitled to at least
16 bring this to your attention.

17 Fletcher: Sure.

18 Gillette: We've abandoned any suggestion we want any money.

19 That's not what we're here for. We're -- we're
20 searching for prospective relief of injunctive form
21 that will permit our patients to get the treatment
22 that they need. This --

23 Fletcher: So -- so, you're representing to me that you've
24 abandoned any -- any request for a judicially ordered
25 compensa- -- monetary compensation?



1 Gillette: Yes, sir. That -- that is my representation.

2 Fletcher: Uh-huh.

3 Gillette: We ain't doing that. Um, and I think, as we've
4 thought about it, we've decided that that was -- that
5 invited the kind of colloquy that's just gone on here.
6 And we didn't intend to do that.

7 Owens: And just so we're clear. Because in my materials
8 here, I have the first amended complaint. I have the
9 second amended complaint. You're saying there was a
10 proposed third amended complaint?

11 Gillette: No. Um --

12 Owens: Or are you just going to drop (inaudible - 00:46:46)?

13 Gillette: What happened was the judge wouldn't let us file an
14 amended complaint because he said we'd had the
15 opportunity to file an amended complaint, and we had.
16 We -- we had added a party. And somehow, the judge
17 wasn't prepared to have us file a complaint that
18 spelled out the things that Judge Fletcher has been
19 talking about in part. And so, we explained, in
20 detail, why it is certain things are true and certain
21 things are not. And, uh, the judge -- frankly, I'm
22 not entirely clear as to how the judge handled that or
23 what he did with it, or whether he even thought about
24 it. Uh, there's just -- the re- -- it just disappears
25 into a hole.



1 Owens: Okay. So -- so, if I'm looking at the second amended
2 complaint, which does have takings claims in it,
3 you're saying that there's a -- there was a plan to
4 file another complaint or -- that would not have the
5 takings claims or that you're just dropping the
6 takings claims?

7 Gillette: Well, if the second amended complaint you're looking
8 at is the one that added the party, there's no
9 substantive change between that and the first. But we
10 filed a complaint, which we labeled second amended
11 complaint, uh, which spelled out in -- in a good deal
12 more detail what was going on and does not seek, uh,
13 monetary relief.

14 McKeown: I mean, I -- the complaint I'm looking at, which is
15 second amended --

16 Owens: Yeah.

17 McKeown: -- said with respect to the takings, plaintiffs do not
18 seek compensatory damages for OHA's --

19 Gillette: Yeah.

20 McKeown: -- unlawful takings.

21 Gillette: Yeah.

22 McKeown: Is that correct?

23 Gillette: Yeah.

24 McKeown: Okay.

25 Gillette: That's -- we -- we're not in that game.



1 Fletcher: Yeah. That -- that's the one you, uh, sought to file
2 but is not yet filed.

3 Gillette: That's the one we sought to file.

4 McKeown: It's --

5 Owens: That last paragraph. Okay. Paragraph (inaudible -
6 00:48:11).

7 Gillette: Yeah.

8 McKeown: That's in the complaint. That's in the current second
9 amended complaint.

10 Gillette: Okay. Well, the thing I -- I couldn't figure out was
11 -- the -- the numbers were -- were throwing me. You
12 wouldn't think one and two would throw me, but that
13 did throw me just a little bit.

14 McKeown: Okay.

15 Gillette: But in any event, I knew that -- I knew that we had
16 made a declaration --

17 Owens: Yeah.

18 Gillette: -- with respect to that.

19 Fletcher: So -- so, it's a --

20 Gillette: Is the reason I asked (inaudible - 00:48:29).

21 Fletcher: So, it's a takings -- it's a takings claim, but the
22 remedy for which is quit doing the taking rather than
23 compensate me for past taking.

24 Gillette: Yes.

25 Fletcher: Okay.



1 Gillette: Cut that out and not pay us for it.

2 Fletcher: Yeah.

3 McKeown: Thank you.

4 Gillette: Um, I have a few seconds left. My friend, uh, Mr.

5 Buehler appears to argue that somehow we're estopped

6 from bringing this action because we've put up with

7 this nonsense for all these years, which is a sort of

8 interesting concept when it comes to constitutional

9 questions. Um, we have never signed on to a

10 certificate which promises that we will do other than

11 provide acute care, in direct answer to Judge

12 Fletcher's question. You -- you drew the line exactly

13 where the line is. We said we would take care of

14 people suffering from acute care, and we're staffed

15 and prepared to do that. That's the certification we

16 go through every couple of years just to keep track of

17 what hospitals are supposed to be available to do

18 certain things. But it's got nothing to do -- nothing

19 to do with promising that, oh yeah, and by the way,

20 once we've got these people stabilized, we'll hold on

21 to them for half a year --

22 Fletcher: Yeah.

23 Gillette: -- uh, because, uh, OHA won't put them somewhere.

24 McKeown: I don't think he's saying -- I think what he's saying

25 is every time you sign the certification, you knew



1 that you were going to be housing these people for
2 longer. So, it's like kind of beating yourself up by
3 keeping signing the certification. I think that's
4 what he's saying.

5 Gillette: I -- uh, alright. That -- that may be true. If -- if
6 it was an exercise in self-flagellation, uh, we've --
7 we've quit.

8 Fletcher: Okay. Well, and this is a variation on the same
9 question. And maybe I'm not going to get, uh, a
10 further elaboration. Why -- if it's well known to you
11 that while you undertake contractually the obligation
12 to provide the acute care as a practical de facto
13 matter, you're undertaking an obligation to keep these
14 people for a very long time, and you're losing money
15 at it, why are you doing this? When you -- the -- the
16 -- apparently, some hospitals in Oregon don't sign up.
17 Why is your -- why are your clients signing up for
18 this if it's --

19 Gillette: We've been --

20 Fletcher: -- if it's a money loser?

21 Gillette: We've been doing it because when patients present to
22 us in need of emergency services and acute care, we
23 have to take them. EMTALA requires us to take them
24 and treat them. We can't just say no. We -- we're
25 not going to deal with you guys because there's no



1 (inaudible - 00:50:44) --

2 Fletcher: So, what about the other -- what about the other
3 hospitals in Oregon that are not signing up for this
4 program? Why don't they have the same obligation that
5 you people do?

6 Gillette: I -- I think what happens with them is EMTALA requires
7 them to provide at least emergency treatment, and to
8 try to find a hospital that's certified to provide the
9 acute care and get them transferred to that. But that
10 has to do with acute care. That has to do with just
11 stabilizing them. It is not a matter of -- of long
12 term care.

13 Fletcher: But -- but those -- but -- but the -- but the reason
14 you gave me as to why your clients sign up for this
15 program, it would seem to me, would apply to every
16 hospital in Oregon. But they're -- but that's not
17 true.

18 Gillette: You know, Judge Fletcher, I don't know the answer to
19 how many have not. Um, and I apologize for not
20 knowing, but I don't. I -- I -- I'm assuming that
21 there are some. I'm representing the folks who
22 regularly sign on because that's the kind of staffing
23 they do. That's what their hospitals are set up for.

24 Fletcher: Okay.

25 Owens: Thank you very much, Counsel. Thanks to --



1 Gillette: Uh, if -- if --

2 Owens: We're -- we're way over, so if you've got --

3 Gillette: I -- I beg your pardon. Yes. Yes, you are. And I
4 appreciate the courtesy. Thanks very much.

5 Owens: Very well. Thank you both for outstanding advocacy
6 today and excellent briefing. We really appreciate
7 it. And a very interesting and challenging case. Uh,
8 this matter is submitted and we are done for the day.

9 Female: All rise.

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DATED this 21st day of May, 2024.



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